Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-920

SAMUEL ZORN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Petitioner, Samuel Zorn, seeks a writ of certiorari to the Court of Appeals of the State of New York, to review an order of the Court, entered September 28, 1972, unanimously affirming an order of the New York State Supreme Court, Appellate Division, First Department, entered March 14, 1972, affirming a judgment of the New York State Supreme Court, New York County, rendered March 23, 1971, convicting Zorn, upon his plea of guilty, of POSSESSION OF GAMBLING RECORDS IN THE SECOND DEGREE (New York Penal Law §225.15), and sentencing him to a nine-month term of imprisonment. Petitioner is presently free on bail pending this Court's determination of the petition.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Statement of the Case

On February 19, 1970, Mr. Martin Ross, a stockbroker employed by Charles Plohn and Company, testified after being subpoenaed and offered immunity, before the Third February 1970 Grand Jury sitting in New York County. Mr. Ross admitted that he had been placing bets on various sporting events, on a weekly basis, with Nat Brown and others. At times Ross's total weekly bets were in excess of ten thousand dollars (Grand Jury testimony of Martin Ross, pp. 34-6; Affidavit of G. Hinckley in application for eavesdropping warrant: 43).* He placed bets with Brown by telephoning an answering service and leaving a message for Brown to call him back.

An investigation into Brown's activities had commenced prior to Ross's grand jury testimony. Thus, on September 29, 1969, Detectives Louis Montello and Louise Ingrisani, assigned to the New York County District Attorney's Office Squad, saw Nat Brown in P. J. Clarke's Restaurant on Third Avenue in Manhattan, talking to Charles "Ruby" Stein and Nick "Jiggs" Forlano; both Stein and Forlano have prior criminal records for violation of gambling laws and Brown has a criminal record dating back to 1946, which includes two arrests for gambling law violations and a con-

* References are to pages of the record on appeal, filed in the New York State Court of Appeals.

viction for bookmaking (Affidavit of G. Hinckley in application for eavesdropping warrant: 42, 44). The detectives heard Brown discussing "bets" that had been made on sporting events and saw Brown hand money to Stein (Affidavit of G. Hinckley in application for eavesdropping warrant: 44).

On Tuesday, February 17, 1970, Brown remained in his apartment, located in Manhattan at 1164 First Avenue, until 11:30 a.m. At that time he left and went to a candy store where he purchased a newspaper and then immediately returned home. He did not leave again until 12:20 p.m. Accompanied by Herbert Beller, Brown then entered a telephone booth on the southeast corner of 64th Street and First Avenue (Affidavit of G. Hinckley in application for eavesdropping warrant: 44-5).

The next day Brown remained at home until 12:05 p.m. He then left his apartment and, after first stopping at a candy store, walked along First Avenue until he met an unknown man. After a short conversation, both men entered the doorway at 1140 First Avenue. When they emerged they walked in opposite directions (Affidavit of G. Hinckley in application for eavesdropping warrant: 45-6).

On February 19, Brown left his apartment at 11:25 a.m. and returned home after stopping at a candy store and a grocery store. He left again at 1:20 p.m. and was followed by Detective Joseph Coffey to Sherry's Restaurant. When the detective entered the restaurant he saw Brown reading a "scratch sheet (a form listing horses that are running)" and then saw the bartender hand money to Brown (Affidavit

of G. Hinckley in application for eavesdropping warrant: 46).

On Tuesday, February 24, 1970, Brown left his apartment at 11:35 a.m. and walked to the southeast corner of 64th Street and First Avenue. He remained there for approximately twenty minutes. During that time he spoke with an unknown man. He then returned to his apartment (Affidavit of G. Hinckley in application for eavesdropping warrant: 46-7).

Patrolman Mullins saw Brown at Gallagher's Restaurant on that evening in the company of Hugh Mulligan, a convicted gambler, Harry Segal, who had an extensive criminal record including arrests for violating gambling laws, and Herbert Beller (Affidavit of G. Hinckley in application for eavesdropping warrant: 47).

At approximately 1:20 p.m. on Monday, March 2, Patrolman Mullins saw Brown enter the telephone booth at the southeast corner of 64th Street and First Avenue, which he had entered on February 17. He spoke on the telephone for approximately fifteen minutes (Affidavit of G. Hinckley in application for eavesdropping warrant: 48).

On March 3, 1970, Brown left his apartment at about 12:45 p.m. and went to the same telephone booth. He remained in the booth, talking on the phone, for approximately five minutes, and then returned to his apartment. He left his apartment again at 1:05 p.m. and went to Sherry's Restaurant, where he was overheard telling Herbert Beller, "I got 9 for 'Cuzzy,' " an apparent reference to gambling

money he must pay to Cuzzy Morgan (Affidavit of G. Hinckley in application for eavesdropping warrant: 48-9).

Shortly after this conversation, Brown entered a phone booth at the Roosevelt Hotel. From an adjacent telephone booth, Detective Coffey overheard Brown say, "I'll be home tonight. If you have those numbers call me there. If you have them beforehand I'll be in Gallagher's" (Affidavit of G. Hinckley in application for eavesdropping warrant: 49).

At about 1:30 p.m. on March 9, 1970, Brown was followed from his apartment at 1164 First Avenue. Brown went directly to the telephone booth on the southeast corner of 64th Street and First Avenue which he had used on the prior occasions (Affidavit of G. Hinckley in application for eavesdropping warrant: 45, 48-9). From outside of the booth, a police officer overheard Brown say, "Ruby just called me. He says we got hit pretty good on the Knick game last night." After a pause he said "No, the office" (Affidvit of G. Hinckley in application for eavesdropping warrant: 49-50).

After this conversation Brown went to a telephone booth at the Roosevelt Hotel. Detective Coffey entered the adjacent phone booth and overheard Brown say, "Nickel, dime, 15, I'll call you from the West Side" (Affidavit of G. Hinckley in application for eavesdropping warrant: 50).

In an affidavit dated March 23, 1970, District Attorney Frank S. Hogan and Assistant District Attorney Gerard J. Hinckley reported the police observations of Brown, and Martin Ross's grand jury testimony, to Justice MURTAGH of the Supreme Court, New York County, and requested a

warrant permitting the interception of Brown's telephone communications at the public phone booth at 64th Street and First Avenue and his home telephone.

Thereafter, Justice MURTAGH, in a warrant effective March 26, 1970, authorized the interception and recording of:

> "[T]he communications of Nellis Slayka, who was known as Nat Brown, also known as Natale LoCicero, pertaining to the crimes of Promoting Gambling as a felony and conspiracy to Promote Gambling, over the lines and instruments bearing the numbers TE 2-8645 [the telephone at Slayka's residence] and 754-9502 [the telephone at the booth on 64th Street and First Avenue], and it is further
>
> "ORDERED, that nothing contained herein shall be construed as authorizing the District Attorney or his agents to intercept or overhear any conversations which appear privileged or unrelated to the aforementioned crime; and that the interception of said conversations shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping by this order * * *" (32-3).

Pursuant to this warrant electronic eavesdropping devices were placed on these telephones. On March 31, 1970, Brown was overheard placing a telephone call to a telephone numbered 243-0538, which was subsequently found to be located at 418 West 17th Street, apartment 2-7J (Affidavit of G. Hinckley for search warrant: 70, 72). Brown identified himself as "N.B. for Perry" and said, "I laid you a dollar forty-five for a nickel on Baltimore and I had UCLA for four dollars, that's it * * * I owe you 3¼ on the ticket" (Affidavit of G. Hinckley for search warrant: 70).

The individual to whom Brown was speaking replied "OK, I'll tell him" and then discussed ball games to be played that night (*Id.* at 70).

On April 1, 1970, Brown again called this number, identified himself as "N.B. for Perry" and asked for the "line" (point spread) on "baseball games and one basketball game" (Affidavit of G. Hinckley for search warrant: 71). When Brown then asked about "hockey" a male voice answered, "We don't deal in hockey" (Affidavit of G. Hinckley for search warrant: 71).

Assistant District Attorney Hinckley reported the substance of these conversations in an affidavit dated April 21, 1970. He averred that experts in the field of gambling had explained to him that by these conversations Brown was placing bets with the individual to whom he spoke on the telephone and that "N.B. for Perry" was a code used to assure the receiver of the phone call that it was safe to take bets from the caller (Affidavit of G. Hinckley for search warrant: 70-1). The assistant district attorney therefore requested a search warrant for the premises in which the phone used by the other individual was located (Affidavit of G. Hinckley for search warrant: 73).

On April 21, 1970, Judge JOHN T. BRINCKLEY of the New York City Criminal Court issued a warrant authorizing an "immediate search of apartment 2-7J, located at 418 West 17th Street" for:

> "[W]ritten records of an unlawful gambling business, including records of bets made on sporting events and other gambling records and gambling paraphernalia [which] may be found, and may be easily and quickly destroyed or disposed of * * *" (67).

Pursuant to the search warrant the police entered apartment 2-7J on April 22, 1970. A search revealed several papers that "indicated that the apartment was being used as a wire room for a large scale gambling operation" (Affidavit of G. Hinckley in opposition to motion to suppress: 65). The police remained in the apartment and several hours later, the petitioner, Samuel Zorn, entered by opening the door with a key (Affidavit of G. Hinckley in opposition to motion to suppress: 65). When Zorn spoke to the officers they recognized his voice as the individual to whom Brown had spoken on the telephone on March 31 and April 1, 1970 (Affidavit of G. Hinckley in opposition to motion to suppress: 66).

Subsequently, Zorn was indicted for promoting gambling in the first degree, possession of gambling records in the first degree and two counts of promoting gambling in the second degree (Ind. No. 3879/70).

Zorn moved to suppress the evidence obtained as a result of eavesdropping, claiming that the eavesdropping warrant did not authorize the interception of his conversations, and therefore the eavesdropping warrant was invalid and any fruits obtained from its use were tainted. On February 16, 1971, the trial court heard argument on the motion. No testimony was taken; instead, Zorn relied upon his affidavit submitted in support of the motion to suppress. The People submitted, in addition to their affidavit in opposition to the motion, the affidavits of Frank S. Hogan and Gerard J. Hinckley, which detailed the investigation of Brown's activities and which had been submitted to Justice MURTAGH in support of the application for the eavesdrop-

ping warrant, and Gerard J. Hinckley's affidavit in support of the search warrant.

The court denied Zorn's motion and, on February 16, 1971, he pleaded guilty to possession of gambling records in the second degree. On March 23, 1971, he was sentenced to a nine-month term of imprisonment.

On March 14, 1972, the New York Supreme Court, Appellate Division, First Department, affirmed the judgment of conviction, three to two. *People* v. *Zorn*, 38 A.D.2d 359, 329 N.Y.S.2d 592 (1st Dept. 1972), *leave to appeal granted*, FULD, C.J.

In the New York Court of Appeals, Zorn argued, as he did in the trial court and the Appellate Division, that because the warrant did not name him, his conversation with the named party could not be introduced as evidence against him. Additionally, he claimed that the warrant improperly permitted interception to continue for 30 days any time during the day or night. The Court of Appeals, in an opinion by Judge BREITEL, unanimously rejected these claims and affirmed Zorn's conviction. *People* v. *Gnozzo* (*Zorn*),* 31 N.Y.2d 134, 335 N.Y.S.2d 259, 286 N.E.2d 706 (1972). The court concluded that "[n]either the constitution nor the former New York Code of Criminal Procedure and current New York Criminal Procedure Law prohibit the use of validly intercepted conversations against an outside party to the conversation, not named in the warrant" (Petitioner's Appendix C, p. C-2), that authorization to inter-

* *People* v. *Gnozzo*, a case also involving the claim that conversations of individuals not named in the warrant should be excluded, was decided together with *People* v. *Zorn*.

cept for 30 days was constitutionally proper, and that the execution of the warrant need not have been limited to daylight hours (*Id.* at C-5).

ARGUMENT

Zorn's meritless claims were properly rejected by the New York State Court of Appeals and do not raise substantial questions worthy of review by this Court.

Zorn seeks a writ of certiorari to the New York State Court of Appeals, reasserting the claim that the federal constitution prohibits the introduction into evidence of his conversation with Nat Brown because the eavesdropping warrant did not name petitioner. Additionally, he argues that the former New York Code of Criminal Procedure, Section 825(4) [now CPL §700.65(4)], required that the warrant be amended to include his name, and he contests the constitutionality of authorization to eavesdrop for thirty days any time during the day or night.

A unanimous New York State Court of Appeals, in an opinion by Judge BREITEL, concluded that neither the federal constitution nor the eavesdropping statutes precluded the evidentiary use of conversations of individuals overheard talking to the person named in the warrant. The same conclusion has been reached by every federal court that has dealt with the issue.* *United States* v. *Tortorello*, 342 F. Supp. 1029 (S.D.N.Y. 1972); *United States* v. *Ianelli*, 339 F. Supp. 171 (W.D. Pa. 1972); *United States* v. *La*

* Additionally, the Supreme Court of Colorado has rejected a similar claim about the state's eavesdropping statute. *People* v. *Martin*, 490 P.2d 924 (1971).

Gorga, 336 F. Supp. 190, 192 (W.D. Pa. 1971); *United States* v. *King*, 335 F. Supp. 523, 532 (S.D. Calif. 1971); *United States* v. *Perrillo*, 333 F. Supp. 914, 921 (D.C. Del. 1971); *United States* v. *Sklaroff*, 323 F. Supp. 296 (S.D. Fla. 1971), *appeal dismissed*, 427 F.2d 1140 (5th Cir. 1970); *United States* v. *Escandar*, 319 F. Supp. 295 (S.D. Fla. 1970), *rev'd on other grounds, sub nom, United States* v. *Robinson*, —— F.2d —— (5th Cir. 1972).

Similarly, Judge BREITEL found petitioner's claims about the duration of the authorized eavesdropping to be meritless. Several federal courts have reached the same conclusion with respect to eavesdropping under the corresponding provisions of the federal statute. *United States* v. *Focarile*, 340 F. Supp. 1033 (D. Maryland 1972); *United States* v. *Becker*, 334 F. Supp. 546 (S.D.N.Y. 1971); *United States* v. *Leta*, 332 F. Supp. 1357 (M.D. Pa. 1971). Indeed, only one federal court has reached a contrary conclusion. In *United States* v. *Whitaker*, 343 F. Supp. 358 (E.D. Pa. 1972) the court concluded that a statute which permitted interception for as long as thirty days was unconstitutional. This decision is based upon an erroneous interpretation of this Court's decisions in *Katz* v. *United States*, 389 U.S. 347 (1969) and *Osborne* v. *United States*, 385 U.S. 323 (1966) as holding that eavesdropping could not be conducted constitutionally for periods in excess of what was done in those cases. To the contrary, neither *Osborne* nor *Katz* can be read as invalidating a statute authorizing eavesdropping for up to thirty days if the circumstances justify it.

"It must always be remembered that what the constitution forbids is not all searches and seizures but *unreason-*

able searches and seizures" (emphasis added). *Elkins* v. *United States*, 364 U.S. 206, 222 (1960); *accord*, *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). And authorization to intercept for thirty days, on the facts of this case, did "not descend to the level of unreasonableness." *Wyman* v. *James*, 400 U.S. 309 (1971). Here the thirty-day limitation was proper; this was a conspiracy investigation into a continuing illegal business, and it was most improbable that the conspiracy could be established by the interception of one telephone communication.

Moreover, the conversations in question were overheard on the sixth and seventh days after the effective date of the warrant—March 31, and April 1, 1970. Thus, in view of the limited interception performed, this case does not properly present the question of the legality of thirty days of interception.

We rest upon the decision of the New York State Court of Appeals and the federal courts which have shown that Zorn's claims is lacking in merit and not sufficiently substantial to warrant the granting of a writ of certiorari. *Zucht* v. *King*, 260 U.S. 174 (1922); *Equitable Life Assurance Society* v. *Brown*, 187 U.S. 308, 311 (1902).

Additionally, petitioner's claim that the former New York Code of Criminal Procedure required that the warrant be amended to include his name raises a question of state law—the interpretation of a state statute—and certiorari does not lie. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *Fox Film Corp.* v. *Mullin*, 296 U.S. 207 (1935); *Enterprise Irrigation Dist.* v. *Canal Co.*, 243 U.S. 157 (1917).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1973